Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RESOURCE BANKSHARES CORPORATION;
RESOURCE BANK, PETITIONERS

v.

ST. PAUL MERCURY INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this insurance coverage case relating to an underlying class action lawsuit against the insured alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C.A. § 227, the Fourth Circuit held that the insurer was not obligated to defend the insured in the underlying suit and in doing so raised significant questions regarding the appropriate application of Federal Rule of Civil Procedure 56 and the underlying purpose of the TCPA. The questions presented are:

I. May a federal appellate court improperly expand the procedural mechanisms of Rule 56 of the Federal Rules of Civil Procedure to contravene a state rule of substantive law in violation of the principles of federalism protected by the *Erie* doctrine?

II. Was the decision of the United States Court of Appeals for the Fourth Circuit to depart from established Virginia law limiting review in insurance coverage cases to the "eight corners" of the underlying complaint and the insurance policy "plain error" and/or "clearly wrong," such that it warrants review and reversal by this Court?

III. Does the TCPA protect only one species of privacy right, as held by the Fourth and Seventh Circuits, or are its privacy protections more far reaching, as concluded by a federal court in a decision affirmed by the Fifth Circuit?

RULE 29.6

On April 1, 2004, Fulton Financial Corporation acquired Resource Bankshares Corp. The acquisition was accomplished by merging Resource Bankshares Corp. with and into Fulton Financial Corporation. Thus, Fulton Financial Corporation is now the successor by merger to Resource Bankshares Corp. By virtue of this acquisition, Fulton Financial Corporation became the parent holding corporation of Resource Bank. No publicly held company owns ten percent or more of the stock of Fulton Financial Corporation.

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OPINIONS AND ORDERS BELOW

The opinion of the Fourth Circuit appears in the Appendix at 1a – 26a and is reported at 407 F.3d 631 (4th Cir. 2005). The opinion of the Eastern District of Virginia appears in the Appendix at 27a – 54a and is reported at 323 F. Supp. 2d 709 (E.D. Va. 2004).

JURISDICTION

The Fourth Circuit issued its original opinion on May 11, 2005. Subsequently, petitioners timely filed a petition for rehearing and petition for rehearing *en banc*, which the Fourth Circuit denied by order entered on June 7, 2005. App. 95a-96a. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1254(1).

RULE AND STATUTORY PROVISIONS INVOLVED

(A) Federal Rule of Civil Procedure 56 provides in relevant part as follows (set forth fully in the appendix):

> **(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof. ...
> **(e) Form of Affidavits; Further Testimony; Defense Required.** .... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not

> rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(B) Telephone Consumer Protection Act, 47 U.S.C.A. § 227 (set forth fully in the appendix).

STATEMENT

This case involves insurance coverage for claims of alleged violations of the Telephone Consumer Protection Act, a federal statute regulating so-called "junk faxes." Relying upon Rule 56 of the Federal Rules of Civil Procedure, the Fourth Circuit denied coverage under the property damage provisions of the relevant insurance policies – even though the Fourth Circuit's improper application of this federal procedural rule created a conflict with Virginia substantive law regarding the proper analysis to follow in insurance coverage claims. In addition to the consequent violence done to the principles of federalism protected by *Erie*, the Fourth Circuit's failure to follow clearly established state substantive law constituted such plain error and was so clearly wrong that it provides an independent basis for this Court's review. Furthermore, in addressing coverage under the advertising injury provisions of the policies, the Fourth Circuit determined that the TCPA itself only protects a certain subspecies of privacy rights – even though there is no

basis for such a limitation of the privacy protections afforded by the TCPA, a federal statute implemented for the broad remedial purpose of, *inter alia*, protecting the rights of consumers and businesses from a long list of advertising abuses. All three of these errors compel this Court's review and reversal.

The question properly before the Fourth Circuit was whether St. Paul was obligated, pursuant to the terms of insurance policies ("Policies") issued by St. Paul to Resource Bankshares Corp. and Resource Bank (collectively "Resource"), to defend Resource in a class action lawsuit filed against Resource in Indiana ("Underlying Litigation").

The complaint filed in the Underlying Litigation (the "Indiana Complaint") alleges that Resource violated the Telephone Consumer Protection Act ("TCPA") by allegedly transmitting faxes containing advertising material to persons who had not solicited such faxes. Specifically, it states in relevant part as follows:

> 1) "On February 17, 2002, defendants transmitted by telephone facsimile machine (as defined at 47 U.S.C. § 227(a)(2)) material advertising the commercial availability and quality of property, goods and services to a facsimile machine owned by Cohen & Malad ...." App. 86a.
>
> 2) "Cohen & Malad received this facsimile without giving defendants its prior express invitation or permission to receive such advertising material, making it a an (sic)

unsolicited advertisement as defined by 47 U.S.C. § 227(a)(4)." App. 87a.

3) "The TCPA prohibits the facsimile transmission of such unsolicited advertisements, providing: 'it shall be unlawful for any person in the United States... to use any telephone facsimile machine... to send an unsolicited advertisement to a telephone facsimile machine...'" 47 U.S.C. § 227(b)(1)(c). *Id.*

4) "In the last four years, defendants have sent similar unsolicited advertising via facsimile to other individuals and businesses throughout the State of Indiana and the United States." App. 87a – 88a.

5) Unsolicited facsimile advertising "(i) shifts some of the costs of advertising from the sender to the recipient; and (ii) it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk faxes." App. 83a.

The Indiana Complaint further requests that the Court certify the following proposed class:

All persons or entities in the United States who received facsimile transmissions from Resource Bank during the period of March 8, 1998 to March 8, 2002 which contained any material advertising the commercial availability or quality of any property, goods or services